

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No.546 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI

and

MR.JUSTICE K.R.VYAS

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
2. To be referred to the Reporter or not? : YES
3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
5. Whether it is to be circulated to the Civil Judge? : NO

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SHABAAN ROTKIN

Versus

MRS. SHAHIDA ROTKIN  
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Appearance:

Shri G.C. MAZMUDAR for Petitioner  
Shri M.H. Bareja, for Respondent No. 1  
Ms.Amee Yagnik ADDL. PUBLIC PROSECUTOR  
for Respondent No. 3  
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CORAM : MR.JUSTICE R.K.ABICHANDANI and  
MR.JUSTICE K.R.VYAS

Date of decision: 13/07/1999

ORAL JUDGEMENT (Per R.K. Abichandani, J.)

1. The petitioner has sought a direction on the Officer in charge of Navsari Police Station to trace out the respondents nos.1 and 2 along with his two children, namely, daughter Nabeelah and son Yaseen claiming custody

of these children. According to the petitioner he and the respondent no.1, Shahida married on 11th July 1990 as per the Islamic rites. At that time the respondent no.1 was an Indian citizen. Thereafter, due to marriage she became a citizen of Botswana following the petitioner's citizenship. According to the petitioner a daughter and a son were born during the marriage and they are 8 and 4 years of age respectively. Some differences arose between the parties, as a result of which according to the petitioner the respondent no.1 left his house along with their two children. The petitioner learnt that they had crossed the border of that country. The petitioner, therefore, went to Johannesburg in South Africa, which is an adjoining country and filed a petition for restraining them from leaving that country. Since they could not be traced out that petition became infructuous.

2. The petitioner, thereafter, went back to Botswana and applied for the custody of his two minor children. The High Court of the Republic of Botswana issued rule nisi on 30th April 1999 making it returnable on 14th May 1999 calling upon the present respondent, Shahida to show cause as to why she should not be restrained from removing the two minor children from Botswana to India or to any other place without the applicant's written consent and as to why the applicant should not be granted the custody of the two minor children. The proposed order was directed to operate as an interim interdict pending the return day. An affidavit in support of that application was filed by the petitioner. In that affidavit also it was stated that the respondent, Shahida together with the children was seen at Jan Smuts Airport and therefore the petitioner drove to Johannesburg to make inquiries with the Airlines, but the respondent, Shahida and the children could not be traced. On an allegation that the petitioner believed that the respondent, Shahida and her children may have come back to Botswana and were hiding from him, he moved this application. It appears that by an order dated 3rd May 1999, the Court comprising of the Honourable Mr. Justice Gittings in his sitting held at Lobatse, ordered the matter to be heard as an urgent application dispensing with forms and rules of service of process and directing that the rule be published in Mmegi newspaper. Thereafter, on 14th May 1999, the Honourable Mr. P. Collins, Ag. J at Lobatse, on hearing the applicant's Attorney extended the rule nisi to 11th June 1999, ordering publication of the rule nisi and the order to be effected once in a newspaper circulating nationally in the Republic of South Africa. Thereafter, on 11th June 1999, Honourable Mr. P. Collins, Ag. J. at Lobatse,

on hearing the applicant's Attorney and having read the documents filed in the record, ordered that the respondent Shahida was restrained from removing the two minor children from Botswana to India or to any other place without the applicant's consent and directed that the applicant be granted custody of the minor children. Copies of these orders are annexed to the petition. The marriage certificate is also annexed showing that the marriage between the petitioner and the respondent Shahida had taken place at Navsari on 11th July 1990. It is on the strength of the ex parte order obtained by the petitioner on 11th June 1999 from the High Court of Botswana that the petitioner has pursued the matter here for claiming the custody of the minor children.

3. Notice was issued on the respondent no.1 Shahida, who was earlier not traceable, but has appeared today through her counsel, who has made oral submissions on the basis of the record.

4. The learned counsel appearing for the petitioner strongly contended that the petitioner was armed with an order of the competent court granting custody of his minor children to him; therefore, he was entitled to take away his minor children from the respondent no.1

5. It does appear from the copies of the orders annexed to the petition that the petitioner had made an application for restraining the respondent, Shahida from removing the minor children from Botswana and for their custody and on that application an order was made on 11th June 1999 by the High Court of Botswana restraining removal of the two minor children and ordering grant of their custody to the petitioner. It is evident from whatever record that has been produced that when an application was made in the High Court of Botswana even according to the petitioner the respondent Shahida had left that country and was seen in Johannesburg in South Africa. Before that the respondent Shahida and the children were residing with the petitioner. Having known that the respondent Shahida had left the country with the children the petitioner appears to have taken advantage of that fact and obtained an ex- parte order from the High Court of Botswana. It is clear that the Court did not consider the merits and did not make any speaking order. The aspect of welfare of the children was also not considered.

6. The respondent Shahida, who is present in the Court, states that she does not want to return to Botswana and that she wants to stay in India. It is

contended for her that she is a citizen of India by birth and that her citizenship by birth stands revived. The question of validity of the ex parte order obtained by the petitioner has arisen because as submitted on behalf of respondent no.1, she was never aware of any such order and that she had no knowledge of such proceedings.

7. The petitioner has not produced the certified copy of the order on which he purports to rely upon. Under sec.14 of the Code of Civil Procedure, 1908 ("the Code" for brevity), presumption as to foreign judgment would arise upon the production of any document purporting to be a certified copy of a foreign judgment, but such presumption may be displaced by proving want of jurisdiction. The petitioner has not produced any certified copy of the order of the High Court of Botswana and has produced only a simple copy. Therefore, no implicit reliance can be placed in this habeas corpus proceedings on an uncertified copy of the order passed ex parte against the respondent no.1. Moreover, under sec.13 of the Code, a foreign judgment would be conclusive as to any matter thereby directly adjudicated upon between the same parties, except;

- (a) where it has not been pronounced by a Court of competent jurisdiction;
- (b) where it has not been given on the merits of the case;
- (c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of India in cases in which such law is applicable;
- (d) where proceedings in which the judgment was obtained are opposed to natural justice;
- (e) where it has been obtained by fraud;
- (f) or where it sustains a claim founded on a breach of any law in force in India.  
(emphasis added)

It is, therefore, evident that there are several grounds on which a foreign judgment can be assailed in India.

8. The respondent, mother is in the custody of both the minor children and it would not be appropriate to forcibly remove them from her custody, having regard to

their tender age and the care that they require of their mother. In our opinion it would be in the welfare of these minor children to remain with their mother. In our view, the minor children cannot be said to have been illegally detained because while in India the respondent, mother is entitled to keep them in her custody since they require maternal care and affection which the petitioner cannot give them in Botswana. It also appears that the ex parte order granting custody said to have been passed by the High Court of Botswana was not given on the merits of the case and that it is not a speaking order. The Court did not examine the important aspects of the welfare of these minors before granting custody to their father from their mother. The petitioner did not disclose to that High Court of the possibility of having returned to India where her parents resided. Therefore, without adjudicating upon the final rights of the parties we find that this is not a fit case where in exercise of our writ jurisdiction we should direct handing over the custody of these minor children to the petitioner. The petition is, therefore, rejected. Notice is discharged.

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